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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

18 FELTON A. SPEARS, JR. and SIDNEY
19 SCHOLL, on behalf of themselves and all
others similarly situated,

CASE NO.: 5:08-CV-00868 (RMW)

CLASS ACTION

**NOTICE OF MOTION; MOTION AND
SUPPORTING MEMORANDUM FOR
JURISDICTIONAL DISCOVERY**

Date: August 15, 2008
Time: 9:00 a.m.
Place: Courtroom 6, 4th Floor
280 South 1st Street
San Jose, CA 95113

Honorable Ronald M. Whyte

22 WASHINGTON MUTUAL, INC., a
23 Washington corporation; WASHINGTON
24 MUTUAL BANK, FA (a/k/a
25 WASHINGTON MUTUAL BANK); FIRST
AMERICAN APPRAISEIT, a Delaware
corporation; and LENDER'S SERVICE,
INC..

Defendants.

NOTICE OF MOTION AND MOTION**TO ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT on August 15, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 6, 4th Floor, of the above-entitled Court, located at 280 South 1st Street, San Jose, CA 95113, before the Honorable Ronald M. Whyte, Plaintiffs Felton A. Spears, Jr. and Sidney Scholl will move the Court for the entry of an Order to allow jurisdictional discovery to be taken regarding Plaintiffs' standing to pursue an action against Defendant LSI Appraisal, LLC (f/k/a Lender's Service, Inc.) ("LSI").

Plaintiffs seek, in the alternative to this Court's denying LSI's Motion to Dismiss Plaintiffs' First Amended Complaint for lack of Article III standing, to take discovery related to LSI's participation and role, if any, in Plaintiffs' appraisals and the alleged conspiracy with co-defendants Washington Mutual Bank, FA and First American eAppraiseIT which are subject to the above-captioned action. This Motion is supported by the Affidavit of Joseph N. Kravec, Jr. in Support of Plaintiffs' Motion for Jurisdictional Discovery, the documents filed in this action, and relevant federal law.

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BRIEF AND POINTS OF AUTHORITY

Plaintiffs, by their undersigned counsel, respectfully submit this Brief and Points of Authority in support of their Motion for Jurisdictional Discovery in the alternative to this Court's outright denial of Defendant Lender's Services, Inc.'s, n/k/a LSI Appraisal, LLC ("LSI") Motion to Dismiss: and Memorandum in Support of Motion to Dismiss ("Motion to Dismiss") filed on May 2, 2008.

INTRODUCTION

7 Plaintiffs have brought this putative class action against Defendants LSI, Washington Mutual
8 Bank, FA (“WaMu”), and First American eAppraiseIT (“EA”) for their roles in the conspiracy to inflate
9 home mortgage appraisal values across the United States. To support their claim that Defendants
10 entered into an illegal conspiracy, Plaintiffs have provided evidence from the New York Attorney
11 General’s complaint against First American eAppraiseIT indicating each of the three coconspirators
12 were willing participants in the scheme, and the appraisal report for Plaintiff Sidney Scholl which
13 identifies all three Defendants, including LSI, as parties to the appraisal. This evidence shows Plaintiffs
14 have proper Article III jurisdiction over each Defendant.

Even though no discovery has been taken to determine each Defendants' role in preparing, reviewing, and publishing Plaintiffs' appraisals and each Defendants' role in the alleged conspiracy, LSI seeks to have Plaintiffs' action against it dismissed under the premise that it played no role whatsoever in Plaintiffs' appraisals. LSI's Motion to Dismiss, Memorandum and Points of Authorities ("LSI's Brief"), pp. 6-8. The only supporting "evidence" it has produced to support this blunderbuss claim is the affidavit of its Executive Vice President of Appraisal Operations who fails to deny that LSI received, reviewed, or changed Plaintiffs' appraisals. Affidavit of Kathleen M. Rice In Support [sic] Motion to Dismiss Amended Complaint ("Rice Aff."), ¶¶ 6, 10, 12, 14-15. However, as no discovery has been taken in this action, and there is conflicting evidence regarding whether LSI played a role in Plaintiffs' appraisals, a genuine dispute regarding jurisdiction exists. Therefore, this Court should allow Plaintiffs to take discovery to determine whether Article III jurisdiction exists prior to dismissing their action based on LSI's assertion that Plaintiffs lack standing. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.1977).

FACTUAL BACKGROUND

On March 28, 2008, Plaintiffs filed their First Amended Complaint in this action alleging Defendants LSI, WaMu, and EA conspired together to raise the value of WaMu's mortgage loan portfolio through LSI and EA providing falsified appraisal reports which inflate the value of borrowers' properties. First Amended Complaint, ¶ 6. Plaintiffs allege the actions of the conspiracy, and each Defendant by virtue of their participation therein, have harmed both Plaintiffs and a class of all persons who borrowed money from WaMu while the conspiracy was in operation. *Id.*, ¶¶ 7, 56. Plaintiffs allege they were damaged as the result of the conspiracy by virtue of paying for counterfeit appraisals. *Id.*, ¶¶ 7, 56, 82, 98, 104, 109-110, 123, 126-127.

On May 2, 2008, LSI filed its Motion to Dismiss Plaintiffs' First Amended Complaint, in part based on Rule 12(b)(1), alleging Plaintiffs lack standing to pursue an action against them. LSI's Brief, pp. 6-8. To support its Motion, LSI's counsel argues that "LSI played no role whatsoever in the real estate transactions at issue in this action," and "that LSI had absolutely no involvement with or connection to the appraisals at issue in this suit." LSI's Brief, pp. 4, 8. To support its counsel's contentions, LSI submitted the Affidavit of Ms. Kathleen M. Rice, LSI's Executive Vice President of Appraisal Operations for LSI. Rice Aff., ¶ 1.

Ms. Rice attests that she had a search conducted in LSI's databases "for any and all appraisal reports relating to [Plaintiffs] and the properties that are at issue in the Amended Complaint," but does not state if any appraisal reports for Plaintiffs or their properties were discovered. Rice Aff., ¶ 3. Ms. Rice does attest that LSI "had not prepared any appraisal report" for the properties owned by Mr. Spears or Ms. Scholl, and that "LSI was not able to find any appraisal report completed by LSI" for Ms. Scholl's property. Rice Aff., ¶¶ 6, 10, 12, 14-15 (emphasis added). Ms. Rice does not attest whether LSI received, reviewed, or otherwise affected either Plaintiffs' appraisals.

On June 25, 2008, Plaintiffs submitted Plaintiff Sidney Scholl's appraisal report. Affidavit of Joseph N. Kravec, Jr. in Support of Plaintiffs' Responses in Opposition to Defendants' Motions to Dismiss, Exhibit 2 ("Scholl Report"). This report was attached to Plaintiffs' original Class Action Complaint in this lawsuit, and is referenced specifically in Plaintiffs' First Amended Complaint. ¶ 59. The Scholl Report identifies LSI as the appraiser's "CLIENT" for Plaintiff Scholl's appraisal. Scholl

1 Report, p. 6; *see also* Kravec Aff., ¶ 5 (verifying that the email address identified as the appraiser's
 2 client's address belongs to LSI). Ms. Rice acknowledges she reviewed the Scholl Report, notes that
 3 "the appraisal was completed on behalf of eAppraiseIT," and attests that Defendant EA has no corporate
 4 relationship to LSI or its parent company. Rice Aff., ¶ 8.

5 Ms. Rice fails to acknowledge or deny that LSI received Ms. Scholl's appraisal, or to explain
 6 why LSI received it if LSI did not prepare or complete the report. Additionally, neither Ms. Rice nor
 7 LSI's counsel have provided any specific evidence supporting LSI's counsel's claims that "LSI played
 8 no role whatsoever in the real estate transactions at issue in this action," or "that LSI had absolutely no
 9 involvement with or connection to the appraisals at issue in this suit." LSI's Brief, pp. 4, 8. Instead,
 10 Plaintiffs have provided conflicting evidence, in the form of Plaintiff Scholl's appraisal report, which
 11 suggests LSI did have a role or some involvement with Plaintiff's appraisal. Scholl Report, p. 6.

12 ARGUMENT

13 Article III standing is required to establish a justiciable case or controversy within the
 14 jurisdiction of the federal courts. *Gerlinger v. Amazon.com Inc., Borders Group, Inc.*, 526 F.3d 1253,
 15 1256 (9th Cir. 2008). "To satisfy constitutional standing, plaintiffs bear the burden of showing they
 16 meet three requirements: (1) they suffered an injury in fact; (2) the injury is fairly traceable to the
 17 challenged action of defendant; and (3) it is 'likely,' as opposed to 'speculative,' that the injury will be
 18 redressed by a favorable decision." *Tyler v. Cuomo*, 236 F.3d 1124, 1131-32 (9th Cir. 2000), *citing*
 19 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "In a class action, standing is satisfied
 20 if at least one named plaintiff meets the requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d
 21 974, 985 (9th Cir. 2007), *citing Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001).

22 As explained more fully in Plaintiffs' Brief in Opposition LSI's Motion to Dismiss, Plaintiffs
 23 have properly alleged they were damaged directly from LSI's willing participation in the conspiracy
 24 with WaMu and EA to provide unlawful, incredible appraisals to Plaintiffs. *See* Plaintiffs'
 25 Memorandum in Opposition to LSI's Motion to Dismiss, Section I.B. This conspiracy is evidenced by
 26 the allegations in Plaintiffs' complaint which quotes emails from the New York Attorney General's
 27 complaint showing specific evidence of LSI's participation in the conspiracy. First Amended
 28 Complaint, ¶¶ 43, 53. The conspiracy is further evidenced by Plaintiff Scholl's appraisal report which

1 identifies each of the three Defendants as “clients” for the same appraisal. Scholl Report, p. 6.
 2 Jurisdiction is therefore proper against LSI as it is listed as the appraiser’s client on the Scholl Report,
 3 and for its role as a co-conspirator in the alleged scheme. *Applied Equipment Corporation v. Litton*
 4 *Saudi Arabia Limited*, 869 P.2d 454, 510-511 (Cal. 1994)(under California law, liability is imposed “on
 5 persons who, although not actually committing a tort themselves, share with the immediate tortfeasors
 6 a common plan or design in its perpetration”).

7 Even though Plaintiffs’ allegations, the law, and the facts adduced prior to any formal discovery
 8 being taken all support finding Plaintiffs have standing over LSI, LSI’s counsel argues that Plaintiffs
 9 cannot trace any injuries they allegedly suffered to LSI’s conduct. LSI’s Brief, pp. 2, 7. LSI’s counsel
 10 asserts “LSI played no role whatsoever in the real estate transactions at issue in this action,” and “that
 11 LSI had absolutely no involvement with or connection to the appraisals at issue in this suit.” LSI’s
 12 Brief, pp. 4, 8. LSI’s counsel presumably relies on the testimony of LSI’s Executive Vice President of
 13 Appraisal Operations. *See* Rice Aff., ¶ 3. LSI’s submission of Ms. Rice’s Affidavit is a factual
 14 challenge to jurisdiction, and Plaintiffs should be permitted discovery to refute LSI’s thus-far
 15 unsupported contentions. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004).

16 In the Ninth Circuit, “where pertinent facts bearing on the question of jurisdiction are in dispute,
 17 discovery should be allowed.” *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th
 18 Cir.1989)(citing *Wells Fargo & Co.*, 556 F.2d 406, 430-31, n. 24 (9th Cir.1977)). It is reversible error
 19 when a district court refuses to grant jurisdictional discovery unless “it is clear that further discovery
 20 would not demonstrate facts sufficient to constitute a basis for jurisdiction.” *Wells Fargo & Co.*, 556
 21 F.2d at 430-31, n. 24. For a district court within the Ninth Circuit to dismiss a plaintiff’s claim for lack
 22 of Article III standing on a factual challenge, the defendant must produce “conclusive evidence” to
 23 justify denial of jurisdictional discovery. *Farr v. U.S.*, 990 F.2d 451, 454 (9th Cir.1993).

24 Here, LSI fails to produce any evidence supporting its counsel’s statement “that LSI had
 25 absolutely no involvement with or connection to the appraisals at issue in this suit.” LSI’s Brief, p.8.
 26 The only specific evidence in this case so far is Plaintiffs’ appraisal reports, one of which specifically
 27 identifies LSI as a “client” and as having received the appraisal. Scholl Report, p. 6. The only
 28 “evidence” LSI has presented to the Court is its affiant’s statement which only states LSI did not

1 “prepare” or “complete” appraisals for Plaintiffs. *Id.*, 6, 10, 12, 14-15. LSI offers no evidence to deny
 2 that it received, reviewed, changed, or affected either Plaintiffs appraisal reports in some way, or that
 3 it participated in the appraisal scheme as alleged in Plaintiffs’ First Amended Complaint at ¶¶ 6-9, 35-
 4 39, 42-43, 53-54, 56.

5 Where, as here, it is certainly not clear “that further discovery would not demonstrate facts
 6 sufficient to constitute a basis for jurisdiction,” discovery must be allowed to determine if Plaintiffs
 7 have standing. *Wells Fargo & Co.*, 556 F.2d at 430-31, n. 24. LSI’s counsel’s conclusory statements
 8 “that LSI had absolutely no involvement with or connection to the appraisals at issue in this suit,”
 9 unsupported by any evidence, including LSI’s own affiant, is clearly not the “conclusive evidence” the
 10 Ninth Circuit requires for Plaintiffs’ action to be dismissed on jurisdictional grounds prior to discovery
 11 being taken. *Farr*, 660 F.2d at 454.

12 CONCLUSION

13 For the foregoing reasons, Plaintiffs respectfully request that if the Court does not dismiss LSI’s
 14 Motion to Dismiss based on Rule 12(b)(1) outright, that Plaintiffs be allowed to take discovery
 15 regarding jurisdictional issues. Accordingly, Plaintiffs have submitted a list of topics for discovery to
 16 determine LSI’s role in the alleged conspiracy and what role LSI had in Plaintiffs’ appraisals. Kravec
 17 Aff., ¶ 9.

18 Dated: June 25, 2008

**SPECTER SPECTER EVANS &
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PROOF OF SERVICE

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } SS.:

I am employed in the County of Allegheny, State of Pennsylvania. I am over the age of 18 and not a party to the within action. My business address is The 26th Floor Koppers Building, Pittsburgh, Pennsylvania 15219.

On June 25, 2008, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Joseph N. Kravec, Jr., I filed and served the document(s) described as:

**NOTICE OF MOTION; MOTION AND SUPPORTING
MEMORANDUM FOR JURISDICTIONAL DISCOVERY**

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties are served as follows:

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4 **Attorneys for Defendant LSI Appraisal, LLC**

5 On June 25, 2008, I served the document(s) described as:

6 **NOTICE OF MOTION; MOTION AND SUPPORTING
7 MEMORANDUM FOR JURISDICTIONAL DISCOVERY**

8 by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as
follows:

9 Kerry Ford Cunningham, Esquire
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10 Thacher Proffitt & Wood LLP
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11 New York, New York 10281

12 **Attorneys for eAppraiseIT**

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15 San Francisco, CA 94111-3619

16 **Attorneys for LSI Appraisal, LLC**

17 I served the above document(s) as follows:

18 BY MAIL. I am familiar with the firm's practice of collection and processing
correspondence by mailing. Under that practice it would be deposited with U.S. postal
19 service on that same day with postage thereon fully prepaid at Pittsburgh, Pennsylvania
in the ordinary course of business. I am aware that on motion of the party served,
20 service is presumed invalid if postal cancellation date or postage meter date is more than
one day after date of deposit for mailing in an affidavit.

21 I am employed in the office of an attorney who is admitted *pro hac vice* in this
action at whose direction the service was made.

22 I declare under penalty of perjury under the laws of the United States that the
above is true and correct.

23 Executed on June 25, 2008, at Pittsburgh, Pennsylvania.
24

25 S/MARCIA Z. CARNEY
26 Marcia Z. Carney
27
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

FELTON A. SPEARS, JR. and SIDNEY SCHOLL, on behalf of themselves and all others similarly situated.

CASE NO.: 5:08-CV-00868 (RMW)

CLASS ACTION

Plaintiffs,

v.

WASHINGTON MUTUAL, INC., a Washington corporation; WASHINGTON MUTUAL BANK, FA (a/k/a WASHINGTON MUTUAL BANK); FIRST AMERICAN EAPPRAISEIT, a Delaware corporation; and LENDER'S SERVICE, INC.

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
JURISDICTIONAL DISCOVERY**

Defendants.

1 [PROPOSED] ORDER
2

3 AND NOW, this _____ day of _____, 2008, upon consideration
4 of Plaintiffs Felton A. Spears' and Sidney Scholls' Motion for Jurisdictional Discovery,
5 and the arguments of the parties with respect thereto, it is hereby ORDERED,
6 ADJUDGED and DECREED that said Motion is hereby GRANTED. Plaintiffs shall
7 be given ninety days from the date of this Order to conduct discovery regarding the
8 issues of standing with regards to Defendant Lender's Service, Inc., and of Lender's
9 Service Inc.'s involvement in the alleged conspiracy with Defendants Washington
10 Mutual Bank, FA and First American eAppraiseIT to inflate appraisal values.

11 DATED: _____, 2008
12

RONALD M. WHYTE
United States District Judge